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In The

Supreme Court of the United States

October Term, 1988

Federal Communications Commission and Richard L. Thornburgh, Attorney General of the United States,

Appellants and Cross-Appellees,

v.

Sable Communications of California, Inc.,

Respondent and Cross-Appellant.

On Appeal From The United States District Court For The Central District Of California

BRIEF OF THE SAN FRANCISCO AIDS FOUNDATION AS *AMICUS CURIAE* IN *SUPPORT OF CROSS-APPELLANT*

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BRIEF OF THE SAN FRANCISCO AIDS FOUNDATION AS *AMICUS CURIAE*

This brief *amicus curiae* is submitted with the written consent of all parties pursuant to Rule 36.2. The brief is intended to draw the Court's attention to the particular perspective of the San Francisco AIDS Foundation as it may bear upon the issues in this case. Owing to the requirements of Rule 36.2, the brief is captioned in support of cross-appellant.

INTEREST OF THE AMICUS

The San Francisco AIDS Foundation ("the Foundation") is a not-for-profit corporation founded in 1982. The Foundation furnishes social services, emergency housing and a food bank to people with Acquired Immune Deficiency Syndrome ("AIDS") and HIV (AIDS virus) infection. The Foundation also provides AIDS-related information to the public regarding prevention, transmission, epidemiology, and treatment of the disease.

The Foundation's work is supported through the philanthropy of individuals and of diverse civic, business, and charitable organizations. The work of the Foundation has been recognized by the Surgeon General of the United States, whose "Report on Acquired Immune Deficiency Syndrome" p. 36 (hereinafter "Surgeon General's Report") directs the public to the Foundation as a source of information concerning AIDS and HIV.

The disease "AIDS" and its characteristics were described in *Chalk v. United States District Court*, 840 F.2d 701, 706 (9 Cir. 1988).

> AIDS is caused by infection of the individual with HIV, a retrovirus that penetrates chromosomes of certain human cells that combat infection throughout the body. . . .Eventually, the virus destroys its host cells, thereby weakening the victim's immune system. When the immune system is in a compromised state, the victim becomes susceptible to a variety of so-called "opportunistic infections," many of which can prove fatal.

SUMMARY OF ARGUMENT

This Court is called upon to fashion rules which will determine the enforceability of an outright ban on sexually oriented telephone communications, even as they may be directed at or received by mature and receptive adults. Because sexually explicit telephone communications may play a positive role in curbing the AIDS epidemic, the nation's obscenity laws ought not be construed so as to ban all such materials. Sexually explicit telephone communications deserve First Amendment protection if they may help to save lives by deterring or replacing life-threatening behavior.

ARGUMENT

I. Sexually Explicit Commercial Telephone Communications Are Protected Under *Miller v. California* to The Extent That They May Help Prevent The Spread of a Life-Threatening Epidemic

By amendment to 47 U.S.C. § 223 (b) ("the Amendment"), Congress has legislated what the Solicitor General terms "an outright ban" on commercial telephone conversations that are adjudicated "obscene" or "indecent." See Jurisdictional Statement of Appellants, p. 24. This case presents this Court with the first opportunity to evaluate this legislation.

Inevitably this case will affect access to sexually oriented telephone communications by adults who wish to receive them.[1] Accordingly, attention must be given to a

[1] This is true whether the case ultimately adds primarily to substantive or procedural aspects of this Court's "obscenity"

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health crisis the course of which may be directly affected by the ruling in this case.

"Acquired Immune Deficiency Syndrome is an epidemic that has already killed thousands of people, mostly young, productive Americans." Surgeon General's Report, p. 3. The "HIV" viral infection which causes AIDS is transmitted through bodily fluids. Sexual contact is the predominant method of transmission. Medical technology cannot yet cure AIDS or vaccinate against it. Consequently, health professionals must focus on public education as the primary means of stemming further spread of the disease. As the National Academy of Sciences has noted, "education is critical to controlling the spread of HIV/AIDS". National Research Counsel, National Academy of Sciences, "*AIDS: Sexual Behavior and Intravenous Drug Use,*" at 26 (1989) (hereinafter "NAS Report").

An inescapable fact pervades any effort at AIDS awareness, education, or prevention. HIV infection poses inherent issues of human sexual behavior. It is part of the nature of the beast. Accordingly, AIDS education efforts must discuss sex "in clear, explicit language in the idiom of the target audience." NAS Report p. 19.

Health professionals agree that in order to stem the spread of AIDS it is necessary to do more than provide

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jurisprudence. Procedure often dictates outcome in obscenity litigation. Venue is one such example. As this Court observed in *Miller v. California*, 413 U.S. 15 (1973), a jury's evaluation of obscenity issues is a product of its own community standards brought to bear upon the obscenity issue.

the public with information; we must also "induce widespread behavior change." NAS Report p. 21. As the U.S. Government Accounting Office noted in a recent report on AIDS education:

> "[one] step in health education is the provision of persuasive motivators for risk reduction . . . Some research suggests that the motivating effect of fear is quite limited in some populations . . . Prior research suggests an effective alternative – positive motivators. Some motivators are symbolic, such as social approval for risk reduction and "eroticized" safer sex . . . "Eroticizing" is an effort to make safer sex more attractive so that people can more easily substitute safer sex . . . for the riskier sex . . . to which they may be more accustomed."

U.S. Government Accounting Office, *AIDS Education: Reaching the Population at Higher Risk*, September 1988, reprinted in AIDS Reference Guide, Section 1408, p. 9 (March 1989).

There is evidence indicating that so-called "Dial-A-Porn" plays a valuable role in this important facet of behavior modification. Sexually oriented telephone communications, of the type offered by cross-appellant, generated 180,000,000 calls in the year ending February 1984. *See Carlin Communications, Inc.* v. *FCC*, 749 F.2d 113, 114 (2d Cir. 1984). Thus, "however distasteful these materials are to some of us, they are nevertheless a form of communication and entertainment acceptable to a substantial segment of society; otherwise they would have no value in the marketplace." *Marks v. United States*, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part and dissenting in part).

The issue in the era of AIDS is far more serious than "entertainment." Dean Geoffrey R. Stone of the University of Chicago Law School, stated:

> "[T]he very fact . . . that there is a vast market in our society for sexually explicit expression suggests that for many people, this type of speech serves what they believe to be, it may be amusement, it m[a]y be containment, it may be sexual stimulation, it may be fantasy, whatever it is, many of us believe that this expression is to our own lives, in some way, valuable. That value should not be overlooked."

2 Attorney General's Commission on Pornography, Final Report 1269 (July 1986).

Research regarding sexual behavior, undertaken as an adjunct to the worldwide war against AIDS, strongly suggests that sexually explicit materials can play a positive role in reinforcing the public health directive to avoid unsafe sexual interaction with other persons. At the Fourth International Conference on AIDS in Stockholm, U.S. public health researchers reported on a study showing that sexually explicit materials presenting safer sex behavior in an affirmatively erotic manner was the most successful means of motivating persons to change from high-risk to low or no-risk behavior. This change in behavior is exactly what the Surgeon General and other health care professionals deem critical to stopping the spread of AIDS. *See* J. D'Eramo, M. Quadland, W. Shattls, R. Schuman and R. Jacobs, *"The 800 Men Project: A Systematic Evaluation of AIDS Prevention Programs Demonstrating the Efficiency of Erotic, Sexually Explicit Safer Sex Education on Gay and Bisexual Men at Risk for AIDS,"* summarized in CDC AIDS Weekly, p. 13 (October 24, 1988).

Indeed, there is direct evidence that some people consciously use "Dial-A-Porn" as a form of "safe sex" instead of engaging in sexual contact involving the exchange of bodily fluids. Records of the Foundation's safe sex workshops with gay men reveal that participants spontaneously named "phone sex" as a safe sex substitute in every recorded session. Memo to Foundation Staff from C. Frutchey, Assistant Director of Education (March 10, 1989). Several AIDS prevention organizations issue safe sex guidelines listing phone sex as a form of safe sex.[2]

The nation's obscenity laws and public health interest must be allowed to operate in harmony. Indeed, this Court's obscenity jurisprudence explicitly provides for such an accommodation. In *Miller v. California, supra*, this Court held that "obscene" materials do not include those which "taken as a whole [have] serious . . . political or scientific value." 413 U.S. at 24. In the age of AIDS, the "portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain" has a potential life-saving value not anticipated when *Miller* was decided, 413 U.S. at 35. Surely sexually explicit materials which may help save lives – even if "patently offensive" to the majority – have profound political and scientific value deserving of First Amendment protection.

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[2] See, e.g. University of California, San Francisco's AIDS Health Project "Suggested Guidelines For Sensible Sex" (August, 1986) (listing "phone sex" and "pornography" as "no risk sex"); Gay Men's Health Crisis, "Eroticizing Safer Sex", p. 26 (listing "using telephone sex services" as a "safer sex act"). Gay Men's Health Crisis, based in New York City, is the nations largest AIDS service organization.

The scientific importance of encouraging the flow of explicit AIDS information, even when offensive to some, was noted by the National Academy of Sciences:

> "AIDS education efforts provide a number of examples in which *potentially effective prevention activities have become entangled in social conflicts* that caused . . . *a weakening of their message*. Specific controversies have involved restriction on the use of explicit language in educational materials [and the] *conflict between providing scientific information and promoting particular moral values* in AIDS prevention messages."

(NAS Report, p. 26, emphasis added)

To be sure, some might advocate simply eliminating sexual behavior they consider "immoral" as a means of stopping the spread of AIDS. Scientists have noted, however, that some high risk populations have dramatically reduced the spread of AIDS by "making changes in specific sexual practices instead of adopting monogamy or eliminating sexual contact altogether." NAS Report, p. 12. As discussed above, commercial telephone sex services are one such means through which individuals can alter their sexual behavior without risk of exposure to HIV.

That "Dial-A-Porn" is constitutionally protected speech gains further support from the caution which this Court has used in other obscenity cases. For example, this Court has emphasized that the capacity of material to spark sexual interest does not necessarily render it obscene. Materials which provoke "only normal, healthy sexual desires" are not obscene though they may appeal to a "prurient interest." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985). Furthermore, this Court forcefully reiterated, in *Fort Wayne Books, Inc. v. Indiana*, ___

U.S. ___, 57 U.S. Law Week 4180, 4184 (Feb. 21, 1989), that adequate procedural safeguards must insure a "searching" examination of sexually oriented materials before they are banished.

CONCLUSION

As the Court approaches the issues in this case, it should be mindful of the increased social value of sexually explicit materials in the throes of the AIDS crisis. Under present jurisprudence, "Dial-A-Porn" services which appeal to a "prurient interest" in a manner which may be considered "patently offensive" to the majority are nonetheless protected by the First Amendment to the extent that they may divert some individuals from life-threatening behavior.

Respectfully submitted,

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